PUBLIC PROSECUTOR

v.

CHAN POH LIM

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRIAL NO. 58-15-88]
30 SEPTEMBER 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Drugs found hidden underneath fruits in a cardboard box - Alleged that accused refused to remove fruits when required to do so by customs officer - Offer of bribe by accused - Inferences to be drawn - Court ruling that it was unnecessary to rely on presumptions under the Act - Accused instructed and questioned in Bahasa Malaysia when he was not proficient in the language - Whether the defence created any reasonable doubt on the prosecution case - DDA 1952, ss. 2, 37(d), (da)(vi), 39B(1)(a).*

At the Bukit Kayu Hitam customs checkpoint, the accused presented a cardboard box for inspection.

The accused untied raffia cord around the box and PW1, the customs officer saw bunches of petai in the box. PW1 told the accused to remove the petai which the accused did and bunches of mata kuching fruit were exposed.

It was alleged at this point by PW1 that when he requested the accused to remove the mata kuching the accused refused to do so and that he further attempted to bribe PW1.

A package was found in the box which contained dried twigs and leaves. Later analysis confirmed that it was cannabis as defined in the Dangerous Drugs Act/952. (DDA)

It was also adduced in evidence that the accused made a cautioned statement voluntarily on the day of his arrest. This statement was exculpatory in nature. In gist, the accused claimed in the statement that in Hadyai he was presented by way of a gift a box of fruits by a friend from Kuala Lumpur and that he did not suspect that it contained anything other than fruits.

The defence story was that the accused himself removed the mata kuching and that the money that the accused was holding in his hand was for the payment of tax on the fruits.

It was the accused's contention that he did not understand the questions put to him in Bahasa Malaysia.

The Court had now to evaluate the evidence to establish whether a charge of trafficking had been proven.

Held:

[1] It was not necessary for the Court to rely on the presumption under s. 37 as the accused's incriminating conduct constituted independent evidence establishing on a *prima facie* basis that he knew the box contained cannabis.

[2] There was proof of the importation of the box and its contents into Malaysia based on accused's cautioned statement.

[3] There being *prima facie* evidence that he knew of the presence of the cannabis in the box, the importation of the cannabis constituted, again on a *prima facie* basis, 'trafficking' within the meaning as defined in s. 2 of the Act; all the ingredients of the offence of trafficking in cannabis were made out on a *prima facie* basis without resort to the presumptions in s. 37 of DDA.

[4] The accused could understand PW1's request to remove the petai but inexplicably he could no longer understand PW1's request to remove the mata kuching. It was clear that the accused did not want PW1 to probe further into the box.

[5] As regards the money, which the accused said was to pay the tax on the fruits, it was strange why he did not offer to pay for the tax before the box was opened or the petai exposed.

[6] The story of PW1 as regards the refusal of the accused to remove the mata kuching and the attempted bribery was more believable.

[7] Taking into consideration the age of the accused and his experience of frequent travels from Thailand into Malaysia, it was highly unbelievable that he would have been duped by anybody to unknowingly carry a box of drugs into Malaysia.

[8] In light of the evidence adduced, the defence had not created any reasonable doubt on the prosecution's case that the accused was in control and custody of the box and the cannabis, that he was in fact in possession of the cannabis and that he knew of the cannabis in the box.

[Accused found guilty of charge.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(vi), 39B(1)(a)

For the accused - Kumaraendran; M/s. Kumar, Sitham & Co.
For the prosecution - Idris bin Harun, DPP

JUDGMENT

KC Vohrah J:

The accused was charged that he on 23 August 1988 at about 3 p.m at the Customs Check Point at the Immigration Complex, Bukit Kayu Hitam, Kedah, trafficked in 1825.9 grammes of cannabis, an offence punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952.

The evidence showed that after the accused had arrived from Thailand in a bus at the Bukit Kayu Hitam Immigration and Customs Complex, he was given immigration clearance at about 3 p.m. by Immigration Officer PW4 for entry into Malaysia.

At one of the customs' check points for pedestrians and passengers Customs Officer Mohd Razali, PW1, saw the accused come to him with a carry bag (P8) in one hand and a cardboard box (P2) in the other. The box was tied with a raffia cord.

The accused untied the raffia cord and opened the box. And PW1 saw bunches of petai bean pods (petai) in the box. PW1 told the accused to remove the petai which the accused did and bunches of mata kuching fruit (mata kuching) were exposed. PW1 then requested the accused to remove the mata kuching. But, in the words of PW1,

> At that time he did not want do it - he tried to give me money. I saw it was a red note.

PW1 again requested the accused to remove the mata kuching and the accused still did not want to remove it. So PW1 removed the mata kuching and saw "a piece of paper" in the box. This "paper" comprised 2 stiff pieces of paper one which is fitted into the other through cuts in the latter (P5). This rectangular makeshift paper appears to have been adjusted to fit the inner rectangular sides of the box.

PW1 pressed against this paper cover and he felt something underneath it. And in the words of PW1:

> Then again the accused tried to give the note he was holding earlier.

PW1 did not take the note.

PW1 requested the accused for his passport and brought him together with the box and its contents and the carry bag to see his superior officer, Superintendent Sabaruddin bin Kassim (PW2).

PW2 instructed PW1 to take out the contents of the box. PW1 found that below the paper cover (P5) was a package wrapped in plastic material. According to PW2 this package fitted the box.

PW2 then unwrapped the package. It had 3 plastic covers, the first being transparent, the second black and third transparent. The package contained dried twigs and leaves in a clear plastic cover (P12) which PW2 suspected to be cannabis.

The IO of the case, Superintendent Hadzri bin Mohd Sabri, PW5 who was called to the room of PW2 by PW1 at about 3.15 p.m received all the exhibits of the case from PW2 at his office. PW5 sent the package suspected to contain cannabis to the chemist on 30 August 1988 and the chemist report (P16) shows that the contents of the package were examined and analysed and found to contain 1825.9 grammes of "cannabis"; "cannabis" is as defined in the Dangerous Drugs Act 1952.

Defence Counsel when cross-examining PW1 suggested to him that when the accused was holding the money in his hand PW2 "would not know if the accused was prepared to pay money as tax for the fruits". PW1 agreed that he would not have known.

It was also suggested to PW1 that the accused himself removed the mata kuching but PW1 said he (PW1) himself took out the fruits.

It was also adduced in evidence that the accused made a cautioned statement to PW5 voluntarily on the day of his arrest. This statement was exculpatory in nature. In gist, the accused claimed in the statement that in Hadyai on 22 August 1988 he was presented by way of a gift a box of fruits by a friend from Kuala Lumpur and he did not suspect that it contained anything other than fruits.

At the close of the case for the prosecution the contradicted primary facts, not inherently incredible, showed that the accused was in control and custody of the box containing a dangerous drug, cannabis. Ordinarily, under s. 37(d) of the Act the accused shall be deemed to be in possession of the ganja until the contrary is proved. And again the accused shall be deemed to know the nature of the drug until the contrary is proved. The cannabis being in excess of the presumptive amount shown in s. 37(da)(vi) the accused shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Counsel for the accused submitted to the effect, to put it briefly, that the accused's statement in the cautioned statement that he did not suspect that the box contained anything other than fruits negatived the presumption of knowledge raised in s. 37(d) at the close of the case for the prosecution. I disagreed. The accused did not want to remove the layer of mata kuching in the box after he had removed the top layer of petai when requested to do so by PW1 and he also tried to give PW1 money. Then again PW1 requested the accused to remove it. PW1 then himself removed the mata kuching. And after PW1 had removed this layer of mata kuching he saw the paper cover and pressed on the said paper cover and again the man tried to give the money he was holding in his hand. On a *prima facie* basis the conduct of the accused showed that he knew what was underneath the paper cover. I did not think in the circumstances the accused's cautioned statement had negatived the presumption of knowledge at the close of the case for the prosecution. In fact it was not necessary for the Court to rely on that presumption as his incriminating conduct constituted independent evidence establishing, on a *prima facie* basis, that he knew the box had cannabis. And since the accused in his cautioned statement had stated that the box had been brought from Thailand into Malaysia there was proof of the importation of the box and its contents into Malaysia. There being *prima facie* evidence that he knew of the presence of the cannabis in the box, the importation of the cannabis constituted, again on a *prima facie* basis, "trafficking" within its meaning as defined in s. 2 of the Act; all the ingredients of the offence of trafficking in cannabis were made out on a *prima facie* basis without resort to the presumptions in s. 37 of the Act.

I therefore called upon the accused to make his defence on the charge.

The accused elected to give evidence on oath. He denied knowing that the box contained the cannabis which PW1 discovered. He admitted he had a Malaysian RM10 note in his hand but said that it was for the purpose of paying "tax" on the mata kuching. He said he could not speak Malay and did not understand what PW1 was telling him. And he said he assisted PW1 in taking out the mata kuching from the box.

The accused is a Singaporean. He recounted how he came to be with the box. He said that a day before his arrest he met a friend, one Ah Goh, in the central market, Hadyai, Thailand at about 9 a.m. This Ah Goh was a friend of his mistress and he had known him some 2 or 3 months earlier. He agreed that was the second time he had met him.

He said that at the meeting Ah Goh asked him when he was going back and he replied it was to be the following day. Ah Goh requested him for his address in Singapore and he asked the accused if he liked to take mata kuching. The accused said he told Ah Goh that his wife liked to eat petai and Ah Goh told him he had friends who could sell fruits cheaply. Ah Goh then told him to go to a coffee shop at 2 p.m. The accused waited for Ah Goh at the coffee shop at 2 p.m. And Ah Goh brought to him the box, P2, which was tied. Ah Goh told him that he was going back to Kuala Lumpur and that 2 or 3 days after that he was going down to Singapore to look for him and that he was definitely going to Singapore. The accused tore a bit of the corner of the box and he saw petai inside the box. And he put the box in his house which he had rented in Hadyai.

According to the accused, at 11 a.m. the next day, the day of his arrest, he took a bus and on arrival at Bukit Kayu Hitam the passengers got down and he went to have his passport "chopped" after which he put his travelling bag and the box to the customs check point.

He narrated what took place at the customs check point and it will be noted that although his story of what took place in regard to the sequence of events is broadly similar to what was described by PW1, his story attempted to put a different complexion on his conduct, which according to the prosecution evidence, showed that he was aware of the package of cannabis in the box.

According to him this was what took place at the customs check point. He had placed his bag and the box on the platform. The customs officer spoke to him in Malay but he could not understand the officer. He saw the customs officer signalling to him to open the bag and the box for inspection. The accused then untied the string tied round the box and he lifted the flap of the box and he saw petai in the box. He took out the petai and he saw mata kuching in the box. The accused stated that at that time the customs officer was saying something but he could not understand him and he thought that the officer was going to "tax" him. He said that he (the accused) had a ten dollar note with him. He saw the customs officer take out the fruits and he then helped him take out the fruits. The accused said:

> At this juncture I offered to pay the tax to him.

The accused also said that the officer's hand was in the box and the officer said something but he could not understand him. According to him:

> I thought I wanted to pay money for the tax and he appeared angry. He asked for my passport and he put back fruits into the box.

He said he understood the officer when the officer asked for his passport because the word 'passport' was used.

The accused stated that the customs officer then brought him to an office and **"asked me to sit down."** (Emphasis mine) He said the officer opened the lid of the box and he took out a package from the box. He stated, Then he tore a bit of the package and **he asked me what that was.** I did not know what it was; I only shook my head. (Emphasis mine)

Later a person who appeared to be the superior officer of PW1 came and that man took him to his room and had asked him to sit down. According to the accused PW1 there he and his bag were searched and a cautioned statement taken from him voluntarily.

While the story narrated by PW1 showed that the accused did not want to remove the mata kuching on both occasions when PW1 requested him to do so the accused's story was that he did not understand what PW1 was saying. When it was put to PW1 that the accused could hardly speak proper Malay his answer was:

> I do not know whether he could speak a lot or little of Malay.

The proper question, however, should be whether the accused understood Malay. The evidence was that the accused was a China born Singaporean and he could not understand Bahasa Malaysia. But there was a passage in the cautioned statement where the accused, in reply to the fifth question by PW1, said:

> Pegawai Kastam menyuruh saya membuka kotak itu dan beliau telah memasukkan tangannya ke dalam kotak tersebut dan beliau bertanya saya,'Apakah kandungan di bahagian bawah kotak tersebut'.

While I doubt he himself made word for word the faultless Malay statement:

> ... dan beliau telah bertanya saya, apakah kandungan di bahagian bawah kotak tersebut

- it was in fact a statement interpreted from a Chinese language or dialect into Malay - what was intended to be conveyed in that statement was that PW1 had asked him what was in the lower portion of the box. In examination in chief the accused did say that PW1 had brought him to an office and had asked him to sit down. According to the accused PW1 took out the package from the box and:

> Then he tore a bit of the package and **he asked me what that was**. (Emphasis mine)

It has to be stated that in the cautioned statement the accused also stated:

> Dan lagi sekali kemudian beliau bertanya apakah bungkusan plastik hitam dalam kotak itu. Tetapi saya tidak tahu apakah kandungannya. Pegawai Kastam itu kemudian meminta paspot saya dan menyuruh saya mengikut beliau datang ke pejabat.

This shows that PW1 had asked him what was in the black package. I am mindful that from the point of sequence this segment of events should have been at a later stage because the evidence of PW1 and the accused was that the black package was taken out in an office. But the point is that this was the statement admitted by the accused to have been voluntarily made and he himself had not made, during his evidence, any comments or explanation as regards any discrepancies appearing in the statement. The events may have been telescoped into one segment in the narration but what is important is the essence that the accused understood the question of PW1. And the prosecution evidence was that although PW1 twice requested the accused to remove the mata kuching he did not do so.

The accused had no difficulty in understanding PW1's request to remove the petai and he had no hesitation in removing the petai. But the removal of the mata kuching would have exposed the paper cover. And, inexplicably, no longer could he understand PW1. It is clear that the accused did not expect PW1 to probe further after seeing the mata kuching and it is clear that was why he did not want to remove the mata kuching. He admitted offering PW1 ten ringgit but said that it was towards payment of "tax" for the fruits. But why did he not offer to pay "tax" when the petai was first exposed? He said that he had not paid "tax" on petai before during his previous trips but PW1's evidence was that duty is payable on petai as well. The point is, on his own admission, the accused knew that there was mata kuching in the box as well as the petai. If his story is to be believed that he had not paid tax on petai before but he had paid on mata kuching and he was desirous of paying tax on the mata kuching why then did he not offer to pay for the mata kuching even before box was opened or as the petai was exposed?

PW1 who at the time of the incident was a customs officer for 6 years, was asked this question:

> When he (the accused) was holding money in hand you would not know if he was prepared to pay money as tax for the fruits?

PW1 answered:

> I would not know.

Defence Counsel said the answer by PW1 negatived the notion that the accused had offered a bribe to PW1. PW1's answer has, however, to be viewed in the context of other questions which were put to him and his answers thereon and in the context of the other relevant events that took place. As regards the other questions and answers, they are as follows:

Q: When you examine a bag, you find something dutiable - you find people offering to pay before examination of bag is completed?

A: Rare.

Q: But it has happened?

A: In my case I have not met.

Q: Six years?

A: That I have never found - when we open and we noticed the items which are dutiable if I say it is RM20 he will bargain for less.

Q: Before you can complete examination of bag?

A: This case I have never found.

The above shows that PW1 did not consider the offer of the money by the accused as an offer to pay duty. And what also has to be considered is that the mata kuching was removed by PW1 himself. The accused had said he had helped remove the mata kuching but PW1, when put the question that the accused himself took out the fruits, said that he himself took out the mata kuching when the accused did not want to remove it. And I believed PW1. It was when PW1 pressed on the exposed paper cover, again the accused made the offer. And it was then that PW1 requested the accused for his passport. Did that indicate that PW1 thought the money was for payment of duty? In the face of the evidence of the accused that when PW1 asked for his passport, "he appeared angry" the submission that PW1 thought the offer of money was an offer to pay "tax" cannot stand. Although PW1 did not spell out that the accused was offering him a bribe it was clear the offer was a bribe offer.

The accused's story that the offer of money was an offer to pay "tax" is unlikely in any event - as a person who admitted he was familiar with customs procedure at Bukit Kayu Hitam he must have known that duty had to be assessed first before payment is made. The RM10 offer was certainly a bribe offer to PW1 not to probe further.

As regards his story about Ah Goh which he gave in his cautioned statement and in his evidence, the implication is clear that Ah Goh had used him without his knowledge to bring the cannabis not only into Malaysia but also to Singapore. And that was through the ruse of giving him a gift of fruits. But how was that the accused could have readily accepted a gift from a person he had met once only before? The evidence was that he had met him two or three months earlier and when Ah Goh offered him the mata kuching the morning of 22 August 1988 that was the second time that they had met. Is it probable that a person who he had met just once before would make a gift of fruits to him? For no reason except that he, Ah Goh, was going to Singapore 2 or 3 days later after going back to Kuala Lumpur to look for him? He was asked if Ah Goh had told him why he wanted to see him in Singapore he said:

... since we were friends nothing wrong for him to see me - he wanted to invite me to Hadyai again.

But what sort of friendship was there? A mere meeting once 2 or 3 months before - that was friendship which culminated in a gift? Hardly probable.

The accused is not a naive schoolboy accepting gifts from a casual acquaintance bringing them into Malaysia from Thailand; he was then a man of 60 years, a contractor, a man who was a frequent visitor of Hadyai, a man who had a mistress in Hadyai and lived in Hadyai in a rented house, a man who was a frequent bus traveller to Malaysia; he was a worldly

man. And it is highly unbelievable that he would have been duped by anybody to unknowingly carry a box of drugs from Thailand into Malaysia. Clearly the accused brought the cannabis into Malaysia hidden under petai and mata kuching in a box in the expectation that he would not be detected carrying the cannabis through.

Having considered the defence in the light of all evidence adduced in the case and without reliance on the presumptions under s. 37 of the Act I find that the defence has not created any reasonable doubt on the prosecution's case that the accused was in control and custody of the box and the cannabis, that he was in fact in possession of the cannabis and that he knew of the cannabis in the box. And there is no reasonable doubt cast on the prosecution's case that he imported the cannabis in the box into Malaysia, the importation being "trafficking" within its meaning defined under s. 2 of the Act. In other words the defence has not created any reasonable doubt on the prosecution's case that the accused trafficked in the cannabis as charged.

I therefore find him guilty on the charge and convict him.

Also found at [1991] 3 CLJ 2903